

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Consumer & Governmental Affairs Bureau)	CG Docket No. 02-278
Seeks Comment on Petition for)	
Expedited Declaratory Ruling from)	
SoundBite Communications, Inc.)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	- 1 -
II. THE OPT-OUT CONFIRMATION TEXT MESSAGES ARE NOT “AUTODIALED.”	- 3 -
III. THE OPT-OUT CONFIRMATION TEXT MESSAGES ARE SENT WITH “PRIOR EXPRESS CONSENT.”	- 4 -
IV. THE OPT-OUT CONFIRMATION TEXT MESSAGES ADVANCE THE GOALS OF THE TCPA AND THE COMMISSION’S <i>ROBOCALL REPORT AND ORDER</i> , AND THEY ARE CONSISTENT WITH INDUSTRY BEST PRACTICES.	- 9 -
V. CONCLUSION	- 11 -

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I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association® (“CTIA”)¹ respectfully submits these comments in response to the March 30, 2012 Public Notice released by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.² In the *Public Notice*, the Bureau seeks comment on a Petition for Expedited Declaratory Ruling filed by SoundBite Communications, Inc. (“SoundBite”),³ in which SoundBite asks the Federal Communications Commission (“Commission”) to clarify that sending a one-time text message confirming a subscriber’s request that no further text messages be sent in the future is not a violation of the

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc.*, CG Docket No. 02-278, Public Notice, DA 12-511 (rel. Mar. 30, 2012) (“*Public Notice*”).

³ *See SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“*Petition*”).

Telephone Consumer Protection Act (“TCPA”)⁴ or the Commission’s TCPA rules.⁵ As discussed below, the Commission should grant the Petition.

Although CTIA fully supports the goal of preventing unwanted telemarketing calls to consumers, one-time, precise opt-out confirmation text messages such as those described in the Petition are not prohibited by the TCPA. They are not “autodialed” because the equipment used to send the messages to specific subscribers lacks the capacity to generate and dial random or sequential numbers. In addition, parties have “prior express consent” to send these messages, and such consent remains in effect until an opt-out request is processed and confirmed, consistent with industry best practices, Commission guidance, and principles of contract law. The messages also advance the TCPA’s and the Commission’s goal of protecting the public from invasions of privacy.

One-time informational text messages confirming that an opt-out request has been received provide a consumer-friendly, balanced approach to preventing unwanted messages while ensuring that subscribers do not miss out on important information. There has been a significant rise in TCPA class actions in recent years, including against SoundBite and others providing opt-out confirmation text messages. The Commission should expedite its review of the Petition and clarify its application of the TCPA to ensure that companies employing this common industry best practice do not become targets for frivolous class action litigation.

⁴ 47 U.S.C. § 227.

⁵ *See* 47 C.F.R. § 64.1200 *et seq.*

II. THE OPT-OUT CONFIRMATION TEXT MESSAGES ARE NOT “AUTODIALED.”

The TCPA prohibits the delivery of “autodialed” calls and text messages to wireless telephone numbers absent an emergency or the “prior express consent” of the called party.⁶ The equipment used to acknowledge the receipt of a text message by sending a one-time, precise opt-out confirmation text message to specific subscribers – such as the SoundBite system – lacks the capacity to generate and dial random or sequential numbers (as the TCPA defines an “autodialer”) and is therefore not an autodialer. Therefore, sending a targeted confirmation message in response to the receipt of an individualized opt-out request does not violate the TCPA.

The TCPA defines “automatic telephone dialing system” or “autodialer” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁷ The phrase “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called.” In addition, the phrase “to dial such numbers” refers to dialing numbers that have been randomly or

⁶ See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003) (“2003 TCPA Report and Order”) (concluding that the TCPA’s restriction on autodialed and prerecorded or artificial calls encompasses both voice calls and text messages, including SMS); *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 15927 ¶ 17 (2004) (stating that “the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages (e.g., phone-to-phone SMS), as well as voice calls”). The Commission recently adopted a requirement that the consent be in writing if the call is for telemarketing purposes. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 (rel. Feb. 15, 2012) (“Robocall Report and Order”).

⁷ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

sequentially generated. Thus, under the plain language of the TCPA, equipment that has no ability or “capacity” to generate or dial random or sequential numbers is not an autodialer.

The SoundBite system described in the Petition does not meet the autodialer definition. According to SoundBite, the system “has absolutely no capacity to store, look-up, or dial in any random or sequential order” and instead sends a single response message “that goes only to the specific device through which the opt-out request was made.”⁸ Specifically, the software reacts to opt-out requests by sending an immediate one-time confirmation text message and separately placing the requesting party’s telephone number on a type of “do not text” list.⁹ The software does not provide a random or sequential number generator or dialer, nor would the use of such features have any benefit in this opt-out context.

The Commission should clarify that a single targeted opt-out confirmation message sent to the telephone number indicating the origin of the opt-out message is not autodialed as defined by the TCPA.

III. THE OPT-OUT CONFIRMATION TEXT MESSAGES ARE SENT WITH “PRIOR EXPRESS CONSENT.”

Even if the opt-out confirmation text messages are considered to be autodialed calls, they are nonetheless exempt from the TCPA’s restriction on autodialed calls to wireless telephone numbers because they are made with the “prior express consent” of the called party,¹⁰ consistent with Commission precedent, industry best practices, and principles of contract law.

Subscribers must opt in to receive text messages. Consistent with the TCPA, industry best practices require parties to obtain opt-in consent before sending text messages to wireless

⁸ Petition at 6.

⁹ *Id.*

¹⁰ See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

telephone numbers. Section 1.5-1 of the Mobile Marketing Association U.S. Consumer Best Practices (“MMA Best Practices”) states that “[c]ontent providers must obtain opt-in approval from subscribers before sending them any SMS or MMS messages or other content from a short code.”¹¹ Content providers also often employ a “double opt-in” or “opt-in confirmation” process, which is required under the MMA Best Practices for “premium rate” messages.¹² The Commission has recognized that the provision of a wireless telephone number by the subscriber “reasonably evidences prior express consent” to be contacted at that number, with the subscriber “hav[ing] in effect given their invitation or permission to be called at the number”¹³ Thus, as a threshold matter, parties following the MMA guidelines for opt-in procedures have obtained prior express consent to send text messages.

Consent remains in effect until an opt-out request is processed and confirmed, consistent with industry best practices and Commission guidance. After a subscriber provides express consent to receive text messages, any later request to opt out of future text messages must be processed by the content provider – an opt-out request is not self-effectuating, and the subscriber’s consent to receive text messages remains in effect and valid at least until the content provider confirms and processes the request. At a minimum, the content provider must receive and verify the opt-out request, remove the wireless telephone number from the active message distribution list, and notify the recipient that no further messages will be sent. By sending the

¹¹ See Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0 § 1.5-1 (Mar. 1, 2011), *available at* mmaglobal.com/bestpractices.pdf. (“MMA Best Practices”); *see also* § 2.6-1 (discussing opt-in guidelines for “premium rate” messages).

¹² *See id.* § 2.6.1-1 *et seq.*

¹³ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559 ¶ 9 (2008) (quotation omitted); *see also* H. Rep. No. 102-317, 13 (1991) (stating that “the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications”).

opt-out request, the subscriber has “in effect given their invitation or permission”¹⁴ to be contacted about the opt-out, including to be notified that the opt-out request has been processed successfully.¹⁵ Similarly, if a user inadvertently sends an opt-out request related to a program for which they are not subscribed, the request provides consent for a content provider to send a confirmatory reply message.

As SoundBite explains in the Petition, industry best practices require parties to send a confirmation text message when processing an opt-out request.¹⁶ Under the MMA Best Practices, for example, if a subscriber sends the word “STOP” or one of several similar opt-out keywords to the content provider, the provider “must respond” with a mobile terminating message (whether or not the subscriber was subscribed to the program).¹⁷ This one-time message confirms the opt-out request in the same way that content providers commonly confirm an opt-in request, as noted above. Carriers and content providers have embraced the MMA Best Practices, and consumers have come to rely on and expect this widespread, standard industry practice. Moreover, the CTIA Compliance Monitoring and Enforcement Playbook, which is part of the wireless industry’s self-regulatory efforts to audit SMS messages and ensure that they are consistent with best practices (including the MMA Best Practices), includes as compliance violations the “[f]ailure to respond to user message to STOP service” and the failure to confirm

¹⁴ *See id.*

¹⁵ For this reason, a confirmation message sent in response to an opt-out request is sent with valid “prior express consent” even if the content provider failed to obtain appropriate consent to send an earlier message (*e.g.*, an inadvertent text message sent to a subscriber that prompted the subscriber to reply with an opt-out request).

¹⁶ *See* Petition at 7-8.

¹⁷ MMA Best Practices § 1.6-4; *see also* § 2.7-12 (providing for opt-out confirmation messages for premium rate programs).

service and message flow terminations.”¹⁸ In addition, in 2008 and 2009, the Florida Attorney General terminated investigations of mobile content practices after the execution of Assurances of Voluntary Compliance (“AVCs”) with several carriers.¹⁹ These AVCs include provisions that parallel the MMA Guidelines with respect to critical disclosure and billing issues, incentivizing carriers further to comply with the broader set of requirements set forth in the MMA Guidelines –(which include sending one-time confirmatory opt-out text messages).

The Commission itself has stated that parties should confirm the receipt of an opt-out request, preferably at the time the request is made.²⁰ Although the Commission was at the time addressing opt-out requests for telemarketing calls, there is no reason to draw a distinction for informational messages and prevent confirmations solely for those messages.²¹ Moreover, in the context of a telephone call, the telemarketer and the consumer at least have the benefit of a “full duplex” connection and can have a real-time, two-way discussion that incorporates the opt-out confirmation at the end of the call. Because a text message is a one-way store-and-forward communication, however, the acknowledgment and related processing of the opt-out request can only be provided via a confirmatory text message.

Opt-out confirmation messages are also consistent with the principles of “offer and acceptance” in contract law. By initially opting in to receive text messages, the subscriber has

¹⁸ CTIA Compliance Monitoring and Enforcement Playbook, 16-17, 20 (Oct. 25, 2011), available at http://www.wmcglobal.com/images/CTIA_playbook.pdf.

¹⁹ See, e.g., Assurance of Voluntary Compliance, *Cingular Wireless LLC*, Case No. L03-3-1219 (Florida Office of Attorney General Feb. 28, 2008); Assurance of Voluntary Compliance, *Verizon Wireless Services LLC*, Case No. L08-3-1035 and *Alltel Communications, LLC*, Case No. L08-3-1034 (Florida Office of Attorney General June 16, 2009).

²⁰ 2003 TCPA Order ¶ 93.

²¹ As discussed in Section IV, *infra*, opt-out confirmation text messages promote a number of policy goals that benefit consumers.

effectively entered into a contract with the content provider.²² Thus, the subscriber's subsequent request to opt out and withdraw the permission it previously granted should properly be viewed as a request to modify or rescind an existing contract. Under basic principles of contract law, however, a contract cannot be modified or rescinded without the mutual assent of both parties.²³ To be effective, there must be both an offer and acceptance.²⁴ In this context, the subscriber's request (*e.g.*, the STOP text) constitutes the offer, and the confirmation text from the calling party is the formal acceptance. The relationship is not terminated by the receipt of the request (offer); instead, it is terminated only when that request is accepted. To comply with the TCPA, the content provider is effectively required to accept the subscriber's request, but the content provider must still provide the formal acceptance to modify or rescind the existing agreement through the confirmation text.

As SoundBite discusses in the Petition, the immediate opt-out confirmation text messages also fall within the grace period for implementing do-not-call requests.²⁵ Although the formal "grace period" in the Commission's rules is limited to telemarketing calls, the same

²² In fact, the Commission's TCPA rules even require a written agreement to effectuate prior express consent in several contexts, including for telemarketing calls to subscribers that have registered their telephone numbers on the national do-not-call registry and for autodialed and prerecorded telemarketing calls to wireless telephone numbers). *See* 47 C.F.R. 64.1200(c)(2)(ii); *Robocall Report and Order* (adopting a prior express written consent requirement for autodialed and prerecorded telemarketing calls and messages to wireless telephone numbers).

²³ 17A Am. Jur. 2d Contracts § 507 ("A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration. Hence, one party to a contract may not unilaterally alter its terms. A modification of a contract requires the mutual assent of both, or all, parties to the contract. Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract.") (citations omitted); *see also id.* § 535 ("A contract can be rescinded by mutual agreement of the parties. ... To have the effect of discharging a contract, an agreement of rescission must be a valid agreement and should be clearly expressed.") (citations omitted).

²⁴ *Id.* § 507.

²⁵ Petition at 4-5.

considerations justify a grace period in this context for processing and confirming opt-out requests.

Finally, CTIA notes that the Commission has repeatedly confirmed (including as recently as earlier this year) that wireless carriers may send free-to-end-user messages to their subscribers without obtaining additional consent.²⁶ Any action on the Petition should have no impact on carriers' ability to send such messages.

IV. THE OPT-OUT CONFIRMATION TEXT MESSAGES ADVANCE THE GOALS OF THE TCPA AND THE COMMISSION'S *ROBOCALL REPORT AND ORDER*, AND THEY ARE CONSISTENT WITH INDUSTRY BEST PRACTICES.

As explained above, the opt-out confirmation text messages described in the Petition are not prohibited by the TCPA. They also advance the TCPA's and the Commission's goal of protecting the public from invasions of privacy and are consistent with widespread industry best practices. In light of these significant benefits, the Commission should confirm expeditiously that parties may send these one-time confirmatory text messages without being exposed to frivolous class action litigation.

Opt-out confirmation text messages support and enhance the TCPA's goal of protecting individual privacy.²⁷ For example, the messages inform subscribers that their opt-out request has been received and processed, thereby confirming a subscriber's expectation that no future messages will be sent. Moreover, now that subscribers increasingly expect to receive these

²⁶ *Robocall Report and Order* at n.3 and ¶¶ 10, 27.

²⁷ *See, e.g., id.* ¶¶ 19 (stating that "by enacting the TCPA and its prohibitions on unwanted calls, Congress has already made an assessment that the benefits of protecting consumer privacy are substantial"), 24 (recognizing Congress's findings in adopting the TCPA that, *inter alia*, telephone subscribers considered certain calls to be an "invasion of privacy" and that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices").

messages, the formal confirmation provides an additional layer of assurance that the subscriber's decision to cease participation in a text messaging program has been respected. The confirmation messages also help authenticate subscribers and ensure that it is actually the subscriber making the opt-out requests. Thus, they serve to highlight any malicious, erroneous or inadvertent opt-out requests and provide an opportunity for subscribers and content providers to remedy the error. Such events could, for example, be the result of a stolen or hacked telephone, maliciousness, or a prank.²⁸

Allowing parties to continue sending opt-out confirmation text messages also advances the Commission's statement in the recent *Robocall Report and Order* that it does not want to "impede" or "unnecessarily restrict" purely informational calls.²⁹ As the Commission recognized, consumers have "come to rely" on a number of "highly desirable" services related to these information calls,³⁰ and opt-out confirmations are a key component of the supporting communications framework for such services. Opt-out confirmation text messages are informational messages that are not sent for telemarketing or promotional purposes. They are often used by parties that send critical, time-sensitive informational calls and messages that benefit consumers, such as account usage and overage updates, account fraud alerts, package delivery notifications, school closing announcements, insurance policy lapse warnings, appointment reminders, flight updates, and payment deadlines. Absent opt-out confirmation messages, subscribers could unintentionally miss out on this important information.

²⁸ Because the opt-out confirmation messages are typically sent immediately after the opt-out request is received and processed, it is possible that they could be delivered to the wireless telephone before the subscriber regains control over the device. In this scenario, the subscriber nonetheless would have a record of each confirmation message in their text message inbox after regaining control over the device and would know which opt-out requests had been processed.

²⁹ See *Robocall Report and Order* ¶ 21.

³⁰ *Id.* ¶ 29.

As discussed above in Section III, one-time opt-out confirmation text messages also are consistent with widely adopted, pro-consumer industry best practices and self-regulatory efforts, including the MMA Best Practices and the CTIA Compliance Monitoring and Enforcement Playbook. The Commission should encourage parties to continue this practice.

V. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition and confirm that parties may send immediate, one-time opt-out confirmation text messages to specific subscribers under the TCPA. The messages do not involve the use of an “autodialer” but, even if they did, they are sent with the prior express consent of the subscriber. This widespread, pro-consumer industry best practice ensures that consumers obtain critical information while respecting individual privacy and requests to prevent future unwanted messages.

Respectfully submitted,

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